IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRANE COMPANY, a Corporation, *Appellant,* *vs.* FIDELITY TRUST COMPANY, Trustee, a corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a corporation, and WILLIS D. HOAG, *Appellees.*	No. 2768

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

SUPPLEMENTAL BRIEF OF APPELLEES

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On the argument of this case appellant asked time to submit a reply brief. On objection by the solicitors for the Fidelity Trust Company, based upon the fact that to permit a reply brief to be filed subsequent to the argument would permit counsel to make statements or produce arguments which the appellees would have no opportunity to meet, the Court granted fifteen days to the appellees to answer any reply brief which might be submitted by the appellant.

THE FACTS.

Counsel insists that the statement contained in our brief,—that it is not shown whether all of the materials were used,—is not accurate and calls attention to the stipulation, wherein it is said that all of the goods furnished by appellant became a part of the property covered by the appellee's mortgage. The stipulation will have to stand for itself in this regard.

In a number of places referred to in our classification, pages 9 to 18 of our brief, the detailed statement as to the various items contains such remarks as:

> " * * we have no record or means of ascertaining whether they were actually used prior to the sale of the gas plant, or whether a part was sold with the gas plant. Stipulation A-1."

Further on:

> "All of these goods involved in the Crane Company's account which were used at Vancouver, except goods referred to in Exhibits A-6 and A-20, were first placed in stock and then were taken from stock as occasion required. In the above statement, unless otherwise noted in the Stipulation, it is not known whether the goods were all used prior to the receivership. Stipulation, Exhibit A, p. 6."

See also Exhibit A-11.

The stipulation, taken as a whole, seems to mean that all of the goods furnished by the intervenor became a part of the mortgaged property, but some of it was not actually put into use, but was carried in stock. The most favorable view for the intervenor is that some of it was not put into use until after the appointment of a receiver.

Counsel's statement, beginning on page 3 of his brief, of the "admitted" facts, is not correct in the following particulars:

1st. We do not admit that there was a diversion of the current income prior to the receivership in an amount exceeding Crane Company's claim. This statement of appellant is predicated upon the stipulation, found on page 57 of the Transcript, in which it is admitted that:

" * * there were actual operating net earnings in excess of the interest of the Washington-Oregon Corporation due and paid by the Washington-Oregon Corporation during said period on the first and consolidated mortgage bonds covered by the present foreclosure suit and in excess of Crane Company's claim; and that if the intervenor Crane Company is held by the court to be in the class of priority claimants and otherwise entitled to priority in enforcing its claim, the intervenor shall be decreed to be entitled to its claim."

The foregoing is not an admission that there was any diversion of any income. Whether the failure to pay intervenor constituted a diversion must depend upon whether intervenor was entitled to payment in preference to the payment of interest to the bondholders or in preference to other payments which were made. That is one of the questions to be decided.

2nd. We do not admit that at the time of the receivership there was in the hands of the Washington-Oregon Corporation sufficient moneys arising from net income to have paid Crane Company's claim in full. Neither is it admitted that *any* such fund went into the hands of the receiver. We do not understand on what portion of the record this statement is based, but it must be some misconception. Counsel does not support this statement with any reference.

3rd. It is admitted that the materials furnished by Crane Company went into and formed a part of the property covered by the complainant's mortgage in the sense hereinbefore stated.

4th. The statements under the head "5," on

page 4, cannot be admitted. Our contentions as to this statement embrace the major part of our original brief.

5th. The statements under figures 6, 7 and 8 are conclusions drawn by the appellant from the facts which are admitted.

On page 19 counsel again says that the stipulation states that diversion actually took place. We have heretofore, under the head "1st," quoted what the stipulation does say. Whether a diversion took place or not depends upon whether counsel is right in his contention of the respective right of the bondholders and of the claimants. There was no diversion if, as we think, the bondholders had a higher claim to their interest than the appellant had to its principal.

It is contended that the statement made on page 45 of our brief, that there were general creditors to the amount of $50,000, is *dehors* the record, and that the statement is unfair. In paragraph VI of the Amended Petition, page 29 of the Transcript, it is said:

> " * * reference is hereby made to the original complaint on file herein for the specific allegations thereof, describing said property and setting out the default of the said Washington-Oregon Corporation, a corporation therein, which said allegations of said complaint are hereby made a part of this petition."

Paragraph XVI of the amended petition says:

> "The said Washington-Oregon Corporation is insolvent."

The original bill of complaint, to which reference is

made in the petition, alleges in the seventeenth paragraph, after stating the default of the Washington-Oregon Corporation in the payment of taxes, and in the payment of interest due July 1st, 1914, on the second mortgage, and the interest due April 1st, 1914, on the first mortgage, states:

> " * * that the Washington-Oregon Corporation has defaulted in the payment of principal and interest of due and outstanding bills payable, exceeding the sum of $250,000; that the said Washington-Oregon Corporation has defaulted in the payment of accounts due and payable exceeding the sum of $100,000; that the creditors of Washington-Oregon Corporation are numerous * * " (Supplemental transcript p 25).

In the amended bill of complaint, it is stated in paragraph twenty-three:

> "* * that Washington-Oregon Corporation defaulted in the payments of accounts due and payable exceeding the sum of $50,000." (Transcript p 18).

We do not know what counsel means when he says that the stipulation "eliminates" such a statement. There is nothing in the stipulation which is capable of being construed to mean that we are not at liberty to refer to the facts alleged by the petitioner.

The further statement, that counsel would, if he desired to go out of the record, say that a settlement was made with all the other creditors, should not be taken seriously. If counsel should make such a statement as that he would be making a statement which is not capable of proof, because it is not true.

Counsel says on page 21 that there is no evidence that the amount which Crane Company are claiming

was due prior to the date of the execution of the notes. This statement of counsel is an inadvertence. *Each of the statements of account attached to the stipulation of facts filed November* 8, 1915, *show that the goods were sold for cash.* Various payments were made prior to the time notes were given (Am. Pet. VIII, tr. p 30). The present suggestion that the accounts were not due prior to the time of the execution of the notes is inconsistent with the entire record of the case.

THE CASES.

There must, of course, be an end of argument, and we will not trouble the court by again reviewing or attempting to summarize the holdings of the various courts. There is so much variance between counsel's interpretation of the cases and that of appellees, that only this court can determine what the decisions actually are. However, we think it necessary to refer to one or two cases again reviewed by the appellant.

In the *Miltenberger* case, 106 U. S. 286, referred to on page 8 of the brief of appellant, the five miles of new road for which preference was allowed *was constructed by the receiver in a case wherein the first mortgagee was a party* and the first mortgagee was held bound by his conduct.

In the case of *Union Trust Company v. Illinois Midland Ry. Co.,* 117 U. S. 434, 462, the trustee of the bondholders was a party to the litigation. The materials for which claims were made were *furnished to the receiver.* Priority was allowed, based upon negligence of the trustees in failing to object.

In the case of *Rodger Ballast Car Co. v. R. R.*

Co., 154 Fed. 629, it seems that counsel is in error in holding that there was no diversion, at least as that term is used by counsel in both his briefs. On page 631 it appears that the receivers "expended $63,000 surfacing the Quincy road and paid out $101,483.52 for rentals, but they paid no part of the purchase price of these cars."

See also in the case of *Lackawana Ry.Co.v.Farmers Loan & Trust Co.,* 176 U. S., 298, 306, cited on page 15 of the reply brief, there was a diversion, if the payment of interest on the mortgage debt and if the making of permanent improvements to the exclusion of the payment of the claim which was the subject of litigation amounts to a diversion. In the statement of the case found on page 480 of volume 44, Lawyers Edition, and on page 309 of the official edition, it appears that the receivers expended under the orders of the court outside of operating expenses over a million and a half dollars, of which three-quarters of a million was interest on first mortgage bonds. However, since the expenditures on which the claim of the Lackawana Company was based were expenditures for construction the court did not allow a preference. Counsel's statement regarding this case is also inaccurate in so far as he says that time was not considered an element in determining the equities. The court in this regard says:

> "Besides the rails in question were delivered long before the railroad company had made any default in the payment of interest, about sixteen months before the company's property was put into the hands of a receiver and about five and one-half years before the appointment of a receiver in this cause."

Further on the court says:

"Under all the circumstances, including the amount of the debt and the long period of credit, the claims in question must be regarded as general unsecured debts," etc.

Reyburn v. Consumers' G.L.& F.Co., 29 Fed. 561. This case is cited by us upon the proposition that gas meters were considered as a part of the original construction, and we think the case sustains the contention made by us in our original brief that the service connections are a part of the construction of the plant, as distinguished from repairs. We do not think it at all material whether the meters are put in in connection with the construction of the whole plant, or are put in from time to time as service connections are made. The point of the decision is that the plant is not complete until the meters are in, and that is equally true in the case at bar.

We think that an examination of many of the other cases referred to in the reply brief will show that the statements of counsel regarding them are inaccurate, but we believe that there is no profit in further discussion of the meaning of the courts, since this court will in any event examine the cases themselves.

We are confining ourselves in this memorandum to calling the court's attention to what we believe to be inaccuracies of statement either as to the facts or as to the decisions of the courts. We do not feel at liberty to go into the case generally, and refer to our original brief as to all points not herein discussed. Respectfully submitted,

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